SUPREME COURT, U. S.

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In the

Supreme Court of the United States

October Term, 1968

No. 1054

HAROLD G. CHILDS,
Petitioner,

vs.

STATE OF OREGON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The majority and dissenting opinion of the Supreme Court of the State of Oregon (App. A of Petition) is reported at 87 Or. Adv. Sh. 495, ___ Or. ___, 447 P.2d 304 (1968).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Petitioner has stated most of the questions presented in non-objective fashion. Therefore respondent restates or accepts the questions presented as follows:

1. Did the Supreme Court of Oregon properly apply *Redrup v. New York*, 386 U.S. 767 (1967), rehearing denied 388 U.S. 924, *Aday v. United States*, 388 U.S. 447 (1967), *Books, Inc. v. United States*, 388 U.S. 449 (1967), *A Quantity of Books v. Kansas*, 388 U.S. 452 (1967)?

2. Petitioner's statement accepted.

3 and 4 (combined). Is proof that the petitioner, a cigar store clerk, was aware of the nature of the allegedly obscene book sufficient proof of scienter of obscenity even though he may not have actually read the book? Is testimony of the purchaser that he asked petitioner where he kept his "dirtier" books, that petitioner indicated a shelf in the rear of the store and stated that he obtained "all of the worst ones" from out of town and kept them there, and that the purchaser bought two paperback books with lurid covers highly suggestive of the sexual nature of the content of said books, sufficient proof of scienter?

5. Is it consistent with due process of law and the constitutional standards for judging obscenity to permit Oregon to convict petitioner without offering expert testimony as to contemporary community stan-

dards, prurient appeal of the book taken as a whole, customary limits of candor and lack of social importance?

6. Does the use of petitioner's statements obtained subsequent to indictment but prior to arrest require reversal under *Chapman v. California*, 386 US 18 (1967)?

7. This question is not raised in the body of the Petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional and statutory provisions involved are correctly stated by the petitioner.

STATEMENT OF THE CASE

The facts as stated by petitioner are accepted. His conclusions and opinions are not accepted. While respondent does not wish to burden the Court with an entire restatement of the case, respondent does wish to point out the following:

1. Petitioner's statement that "The impetus for the prosecution came from the 'Citizens for Decent Literature' (Tr. 45-54, 60)" (Petition 5) is the product of a self-serving imagination which is unsupported by the record.

2. Petitioner claims that respondent's proof of sci-

enter "consisted solely of placing the book 'Lesbian Roommate in evidence." (Petition 6.) This statement is false. At the time of purchase, seven weeks prior to the issuance of the indictment, a police officer entered the petitioner's store and asked him where he kept his "dirtier" books. The petitioner responded by showing the officer a group of books on the back wall. The petitioner said that he got all of the "worst ones" from out of town and kept them in that group (Tr. 243, 244). While it is inferable that the petitioner arranged the books on the racks, there was proof that the petitioner viewed the books as he made the sale (Tr. 246 and 247).

3. Respondent disputes the conclusions of petitioner regarding the nature of the consolidated trial on page 9 of the Petition. Respondent denies that all these books were "substantially the same" and that the evidence of scienter was identical as to all five defendants. Respondent further points out that the jury returned its verdict as to the four defendants rather than as to the eight books. People rather than books were tried.

REASONS FOR DENYING THE WRIT

I

The Oregon Supreme Court properly applied *Redrup v. New York.*

The Oregon Supreme Court applied the standards of

Redrup v. New York, 386 U.S. 767 (1967), in the only way possible. It obtained copies of "Lust Pool" and "Shame Agent" and compared them to "Lesbian Roommate," the book in question in this case:

> "We have examined other available contemporary 'pulp' books such as 'Lust Pool' and 'Shame Agent' which were approved in *Redrup v. New York*, 386 US 767, 87 S Ct 1414, 18 L ed2d 515 (1967), and find the book under present consideration to have been written with considerably less restraint." (87 Or. Adv. Sh. at 501, set out at page A-7, App. A of the Petition.)

The fact that the Oregon Supreme Court's comparison did not result favorably to the petitioner is no basis for petitioner's complaint.

With all respect to the role of this Court, *Redrup* provides no standards to apply other than its unadorned conclusion that "Shame Agent" and "Lust Pool" were not obscene. The Supreme Court of Oregon applied *Redrup* in the most conscientious fashion possible, by comparison of the actual books involved.

To grant the writ of certiorari on this ground would result in yet another obligation of the Supreme Court to examine an individual book, already examined by nine lower judges, and render an individual opinion regarding that book. Summary affirmance or reversal would add nothing to the body of the law and provide

no enlightenment below. If the writ were granted with a view toward express explanatory comparison of "Lesbian Roommate" against the standards of *Roth v. United States*, 354 U.S. 476 (1957), then the resultant opinion would be of much assistance to all parties to obscenity prosecutions and respondent certainly would not resist. The tendency of the Supreme Court to function merely as an additional judicial weighing device of each individual piece of allegedly obscene material, a function exemplified by *Redrup v. New York*, *supra*, and its progeny, is unfortunate and should be curtailed.

II

The Oregon Supreme Court applied the proper standard of scienter of obscenity. It held that there was sufficient proof from which to infer that the petitioner was familiar with the nature of the book he sold.

It is seldom possible to prove that a bookseller charged with dissemination of obscenity has actually read the book involved. Indeed a store owner who promotes, as did the petitioner, a whole rack of "the worst" books from "out of town," is most unlikely to have read each of the books in that rack. Yet there is surely no automatic immunity for volume dealers. Obscenity laws are aimed at the specific antisocial conduct of the knowing purveyance of obscene material. One may knowingly deal in obscene material if he is aware of the ob-

scene nature of his material. Such awareness can come through various circumstances other than the actual reading of the book involved.

Thus the Oregon Supreme Court predicated its opinion as to scienter on the following statement from *Smith v. California*, 361 U.S. 147, 154 (1959):

> "* * * Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial."

Also see *People v. Sikora*, 32 Ill.2d 260, 204 N.E.2d 768, 771-772 (1965). The Oregon court held that the *Smith v. California* standard was met by the inferences available from evidence that when the purchasing officer asked where he kept his "dirtier" books, the petitioner directed him to the back of the store where, in petitioner's words, he kept the "worst ones" which he got from out of town, evidence that after his arrest the petitioner stated that he never sold such material to juveniles and also by the evidence of the book cover itself which was observed and handled by the petitioner at the time of the purchase and, presumably, at the time he arranged the books on the rack (see pages A-3 to A-4, and A-14, App. A of the Petition). The lurid front and back covers

of the book are designed to suggest to customer and dealer alike the prurient nature of its content. Thus as in *Ginzburg v. United States*, 383 U.S. 463 (1966), a much more aggravated case, the petitioner was in " 'the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of [his] customers'," 383 U.S. at 467, and both the court and the defendant were entitled to take the advertised "evaluation at its face value." 383 U.S. at 472.

III

Expert testimony, while admissible, is not essential to establish whether the predominant theme of a book taken as a whole appeals to the prurient interest (unless designed to appeal to a deviant sexual group), national community standards of candor and redeeming social worth.

The prosecution offered testimony that the book was purchased from the petitioner. It further offered the book itself into evidence. "Lesbian Roommate" deals almost exclusively with generally known heterosexual and homosexual activities. The state offered no expert testimony in its case in chief. The petitioner was allowed to offer expert testimony as to what it considered to be the predominant theme of a book, contemporary national community standards of candor and the existence of social importance in the writing. The jury, by its verdict, disagreed with the expert testimony.

As a matter of first principle, respondent points out that it disputes petitioner's reference to books in other cases being "identical" with "Lesbian Roommates." (Petition 13. See also Petition 2, 3, 9 and 10.) No two books are precisely the same and each must be judged on its own merits. Otherwise we would need neither experts nor jurors.

To the issue, the best formulation of the rule is that found in the A.L.I. Model Penal Code § 251.4 (4),[1] under which expert testimony is admissible but not required. The position of the trial court and of the Oregon Supreme Court were basically in accord with the A.L.I. rule. There is no constitutional reason to carve a particular exception from the general proposition that ex-

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1. (4) *Evidence; Adjudication of Obscenity.* In any prosecution under this Section evidence shall be admissible to show:

(a) the character of the audience for which the material was designed or to which it was directed;

(b) what the predominant appeal of the material would be for ordinary adults of any special audience to which it was directed, and what effect, if any it would probably have on conduct of such people;

(c) artistic, literary, scientific, educational or other merits of the material;

(d) the degree of public acceptance of the material in the United States;

(e) appeal to prurient interest, or absence thereof, in advertising or other promotion of the material; and

(f) The good repute of the author, creator, publisher or other person from whom the material originated.

Expert testimony and testimony of the author, creator, publisher or other person from whom the material originated, relating to factors entering into the determination of the issue of obscenity, shall be admissible. The Court shall dismiss a prosecution for obscenity if it is satisfied that the material is not obscene.

pert testimony is required only where the matter to be evaluated is beyond the ability of the non-specialized members of the community to evaluate and not otherwise. Where people of normal experience are able to conclude, expert testimony is improper.

The opinion below is in accord with the rule in *United States v. Klaw*, 350 F.2d 155 (2d Cir. 1965). Basically *Klaw* holds that where the issue is prurient appeal to the average man, we may assume that the jurors are representatives of that class and able to act independently of experts but that where the issue is the existence of prurient appeal to a deviant class we must hopefully assume that most jurors require expert testimony because they are not themselves knowledgeable regarding deviant sexual behavior.

The reading of "Lesbian Roommate" demonstrates that it deals with elemental rather than esoteric sexual practices. Therefore under *Klaw* the jurors were able to judge the material without expert testimony. Further, it is unclear just what sort of credentials would qualify an expert on prurience.

As to national community standards of candor, in this day of nationwide electronic, journalistic and dramatic communication, of travelling artistic exhibits and high literacy as well as geographical mobility, there is no reason to assume that the jurors are unaware of the

contemporary standards of candor of the national community of which they are members. See Whyte, *Expert Testimony in Obscenity Litigation*, 1965 Wisconsin L. Rev. 113. Petitioner had the opportunity through use of his own experts to fill the gaps, if any, in the jurors' familiarity. He has no cause to complain.

Evidence of the book alone is sufficient to show that it contains no social, literary or artistic merit whatever. One need only read the book to come to that conclusion. The petitioner claimed it had certain merit and attempted to demonstrate that through the use of expert testimony. They testified primarily from the addition of a happy and moral ending that "Lesbian Roommates" was possessed of social merit in that it demonstrated the superior values of heterosexual over homosexual love. The jury was as free to reject the evidence of petitioner's witnesses as it would be to disbelieve any other evidence.

Were this Court to require that the prosecution pad its case with expert testimony, the result would be simply to open another area for the creation of a predictable class of plaintiff's and defendant's experts. For example see the list of witnesses in *McCauley v. Tropic of Cancer*, 20 Wis.2d 134, 121 N.W.2d 545 (1963), set out at 1965 Wis. L. Rev. at 123. It is no trick to assemble a group of people with credentials in various fields who have absolute views about censorship or absolute views

about "filth" who will testify willingly and predictably on either side of an obscenity prosecution. Realistically, there is little probative value to expert testimony in an obscenity trial.

The petitioner's experts in this case, despite their high minded purpose, vividly demonstrate the negligible value of expert testimony in the area of obscenity. One of the petitioner's witnesses for example, a college literature professor, feels very strongly that there should be no obscenity laws (Tr. 496-497). He found redeeming merit in each of the books on which the indictment is based. For example, he described Exhibit 2, a novel entitled "Her Raging Needs," as:

> "* * * one of my favorite stories. This is a book I'd like sometime to teach to a class, a select class interested in knowing what bad writing really is." Tr. 380-381.

Another professor of literature called by the petitioner to testify as to community standards of candor testified that in his view obscenity simply does not exist:

> "* * * I do not believe that the term obscenity has any substantive meaning of its own. It is, in my view, a legal fiction. It's a label you put on something if you want to censor it." Tr. 754.

The issue then is whether this Court should grant the

writ in order to consider whether or not to require the state in subsequent cases to find and call to the stand a selection of college professors, ministers and other certificated people more fundamental than those called by the defense. Respondent submits that they would be of no more help to the jury nor to the court in its search for the law than were those called by the petitioner in this case.

IV

The "blurbs" in advertising on the cover and back of a book or magazine are relevant evidence in an obscenity prosecution.

Oregon Revised Statutes 167.151 (4)[2] provides only that the statements on the cover or back of books or magazines are "relevant" evidence of scienter. Petitioner's statement (Petition 16) that the statute permits a "presumption" of scienter from such evidence is false as is demonstrated by a reading of the statute. Under *Ginzburg v. United States*, 383 U.S. 463 (1966), it is clearly admissible as circumstantial proof of scienter and even of obscenity itself.

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2. "(4) In any prosecution for a violation of this section, it shall be relevant on the issue of knowledge to prove the advertising, publicity, promotion, method of handling or labeling of the matter, including any statement on the cover or back of any book or magazine."

V

The Oregon Supreme Court correctly applied the "harmless error rule" of Chapman v. California in regard to statements made by petitioner after indictment and prior to arrest.

The finding of the Supreme Court of Oregon that the error, if any, was harmless finds support in the Petition and in the brief filed by petitioner in the Supreme Court of Oregon.

Petitioner argues that the evidence was not harmless because the prosecutor argued it to the jury (Petition 17). Yet petitioner also points out that he was tried on two separate indictments, each charging the sale of a different book of similar type and that he was convicted under one indictment but the jury was hung as to the other (Petition 9). If the prosecutor's argument were as influential as petitioner claims, the jury would have convicted him on both charges or neither charge. The Petition virtually concedes the point by alleging, among other things, "* * * the evidence of scienter as to the five defendants (including statements solicited from all five in violation of *Massiah*) was also substantially identical as to all defendants," yet petitioner was the only jointly tried defendant who was convicted.

Petitioner emphasizes on certiorari that which he minimized on direct appeal to the Supreme Court of

Oregon. At page 12 of Appellant's Brief in the court below, petitioner characterized the statements as follows:

> "These so-called 'statements' amounted to nothing more than the following: [There follows a description simliar to that in the Petition.]."

The Supreme Court of Oregon did no more than accept petitioner's own characterization of the significance of the evidence. This court should do the same.

This case hardly provides the sort of raw material which would be desirable for re-examination of the holding or application of *Chapman v. California*, 386 U.S. 18 (1967), or *Fahy v. Connecticut*, 375 U.S. 85 (1963).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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